Editor's note: appealed - aff'd, Civ.No. S-81-140 (E.D.Cal. Mar. 11, 1982)

UNITED STATES
v.
ERNEST L. AND EVELYN B. BRUNSKILL

IBLA 80-9 Decided December 5, 1980

Appeal from decision of Administrative Law Judge Dean F. Ratzman declaring the "Gladacres," also known as Glad Acres, placer mining claim null and void. Contest No. CA-5581.

Affirmed.

1. Mining Claims: Discovery: Generally

A discovery of a valuable mineral deposit has been made where minerals have been found and the evidence is of such a character that a prudent person would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine.

2. Mining Claims: Contests

When the Government contests a mining claim, it bears only the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to show by a preponderance of the evidence that a discovery has been made and is present within the limits of the claim.

3. Mining Claims: Contests

Government mineral examiners are not required to perform discovery work for claimants nor to explore beyond a claimant's discovery points. It is incumbent

> upon a mining claimant to keep his discovery points available for inspection by Government mineral examiners. Where he does not, he assumes the risk that the mineral examiner will not be able to veri verify the discovery of the alleged mineral deposit, and his unsupported argument that the samples taken by the examiner are not representative will be rejected.

APPEARANCES: Jane Skanderup, Esq., Auburn, California, for appellants; Charles F. Lawrence, Esq., Office of the General Counsel, U.S. Department of Agriculture, San Francisco, California, for the Government.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Ernest L. and Evelyn B. Brunskill have appealed from a decision of Administrative Law Judge Dean F. Ratzman dated August 31, 1979, declaring the Gladacres placer mining claim null and void. The Gladacres claim is located in the S 1/2 S 1/2 sec. 17, and the N 1/2 N 1/2 sec. 20, T. 30 N., R. 15 E., Mount Diablo meridian, Tuolumne County, California.

The contest was initiated by the Bureau of Land Management (BLM) on behalf of the Forest Service, United States Department of Agriculture, when the BLM filed a complaint February 5, 1979, charging, inter alia, that "[t]here are not presently disclosed within the boundaries of the mining claim minerals of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery."

After the contestee filed a timely answer generally denying the charges, a hearing was held on the contest May 31, 1979, in Fairfield, California, before Administrative Law Judge Dean F. Ratzman. The Judge concluded from the evidence presented at the hearing that the testimony of the contestant's expert witness, plus the uncontroverted evidence that Mr. Brunskill had attempted little or no exploration or development over a very long period of time, made a prima facie case sustaining the charge of no discovery of valuable minerals. Therefore, he declared the Gladacres placer mining claim null and void.

Appellants contend that the Government did not establish a prima facie case because it took only one sample and did not go to bedrock to remove that sample. They take issue with the location of the sampling, contending the Government's examiner selected a poor area and did not examine the "obvious" gold bearing areas. Even using the sample from this poor area showing that gold priced at $275 an ounce would yield $1 per ton, they contend it still would be practical to go ahead and work and develop the claim.

We have reviewed the record in this case and the arguments advanced by the parties. The Judge's decision sets out a summary of the testimony, the pertinent evidence, and the applicable law. We are in agreement with the Judge's findings and conclusions, and adopt his decision in its entirety as the decision of this Board. A copy of the Judge's decision is attached hereto.

[1] The discovery of a valuable mineral deposit within the limits of a mining claim is the sine qua non for a valid location. 30 U.S.C. §§ 23, 35 (1970). A discovery exists "where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." Castle v. Womble, 19 L.D. 455 (1894); United States v. Coleman, 390 U.S. 599 (1968); Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969). This test, known as the "prudent man test" has been refined to require a showing that the mineral in question can be extracted, removed, and presently marketed at a profit, the so-called "marketability test." United States v. Coleman, supra; Converse v. Udall, supra.

Mineralization that only warrants further prospecting or exploration in an effort to ascertain whether sufficient mineralization might be found to justify mining or development does not constitute a valuable mineral deposit. A valuable mineral has not been found simply because the facts might warrant a search for such a deposit. Barton v. Morton, 498 F.2d 288 (9th Cir. 1974); United States v. Porter, 37 IBLA 313 (1978). In order to have a valid mining claim, valuable minerals must be exposed in sufficient quantities to justify development of the claim through actual mining operations. United States v. Marion, 37 IBLA 68 (1978).

[2] When the Government contests a mining claim on a charge of no discovery, it has assumed the burden of going forward with sufficient evidence to establish a prima facie case; then the burden shifts to the claimant to show by a preponderance of the evidence that a discovery has been made and still exists within the limits of the claim. United States v. Zweifel, 508 F.2d 1150 (10th Cir. 1975), cert. denied, 423 U.S. 829, rehearing denied, 423 U.S. 1008 (1976); United States v. Springer, 491 F.2d 239 (9th Cir. 1974), cert. denied, 419 U.S. 834 (1974); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). It is thus crystal clear that the mining claimant is the proponent of an order to declare his claim valid, so that, pursuant to the Administrative Procedures Act, 5 U.S.C. § 556 (1970), it is the claimant who bears the risk of nonpersuasion. Foster v. Seaton, supra; United States v. Arcand, 23 IBLA 226 (1976).
"

[3] It is the duty of the mining claimant whose claim is being contested to keep discovery points available for inspection by Government mineral examiners. Mineral examiners have no affirmative duty to search for indications of a discovery on a mining claim, nor do they have to go beyond examining the discovery points of the claimant. The function of Government's mineral examiners is to examine the discovery points made available by the claimant and to verify, if possible, the claimed discovery. United States v. Bryce, 13 IBLA 340 (1973). Where a claimant fails to keep his discovery points open and safely available for sampling by the Government's examiner he assumes the risk that the Government examiner will be unable to verify the alleged discovery of a valuable mineral deposit. United States v. Knecht, 39 IBLA 8 (1979); United States v. Bechthold, 25 IBLA 77 (1976).

Appellant's contention that the Government did not present a prima facie case is without merit. The Government's prima facie case was adequately established through the expert testimony of the Forest Service Mineral examiner, Mr. Michael Owens. He testified that he had been to the claim four times and succeeded in examining the claim in May of 1978 and May of 1979 (Tr. 8). Contrary to appellant's contention, he found no "obvious" gold bearing areas. Instead, he found little evidence of mining activities and his sampling showed minor e traces of gold from which he calculated the gold value to be $1 per yard, using $275 per ounce for gold value (Tr. 13). From this he concluded a prudent man would not be justified in developing this claim. Moreover, uncontroverted evidence of nonproduction of a mining claim which has continued over a period of years, is sufficient, without more, to establish a prima facie case of invalidity of a mining claim. United States v. Joseph J. Segna, 49 IBLA 73 (1980); United States v. Hess, 46 IBLA 1 (1980).

Mr. Brunskill's evidence clearly did not preponderate over the Government's prima facie case. He admitted on cross examination that only 5 years of working time had been spent on the claim since 1959 and he had only taken out "maybe 8 or 9 ounces" of gold from the claim in 20 years, none of which was sold, most of which was given away (Tr. 62). His own expert geologist, Mr. George Eldon Bedford, merely testified that further exploration was warranted to find out what values existed on the claim (Tr. 84-87). Appellant's presentation was speculative, at best, and did nothing more than to show that further exploration may be warranted on this claim. This falls far short of proving a discovery.

Accordingly, the Judge correctly concluded that there has been no discovery of a valuable mineral deposit within the limits of the contested claim.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Anne Poindexter Lewis
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Edward W. Stuebing
Administrative Judge

August 31, 1979

United States of America,	:	Contest No. CA-5581
	:	
Contestant	:	Involving the "GLADACRES"
	:	also known as GLAD ACRES
v.	:	Placer Mining Claim situat-
	:	ed in S-1/2 S-1/2 Sec.
Ernest L. Brunskill and	:	17, and the N-1/2 N-1/2
Evelyn B. Brunskill,	:	Sec. 20, T. 3 N., R. 15
	:	E. M.D.M., Tuolumne
Contestees	:	County, California

DECISION

Appearances: Charles F. Lawrence, Esq.
Office of the General Counsel
U. S. Dept. of Agriculture
San Francisco, California
For the contestant.

Jane Skanderup, Esq.
Auburn, California
For the contestees

Before: Administrative Law Judge Ratzman

Mining Claim Declared Null and Void

This contest was brought by the Bureau of Land Management on behalf of the United States Forest Service, pursuant to the Hearing and Appeals Procedures of the Department of the Interior, 43 C.F.R. Part 4, to determine the validity of the above-named placer mining claim.

The contestant filed a Complaint on February 5, 1979, which alleges: "There are not presently disclosed within the boundaries of the mining claim minerals of a variety subject to the mining laws, sufficient in quantity, quality, "

and value to constitute a discovery." Additional charges are (i) that the land within the claim is nonmineral in character, and (ii) that the claim is not held in good faith for mining purposes.

A timely Answer denying each allegation was filed by the contestees on February 15, 1979. Thereafter, a hearing was held in Fairfield, California on May 31, 1979. The claim is situated on Rose Creek within the Stanislaus National Forest, near the Forest's western boundary.

Mr. Michael H. Owens, previously employed by the United States Forest Service as a mineral examiner, was called to testify on behalf of the Government. He has a bachelors and masters degree in geology from the University of Tennessee. He has been working in the mining industry for the last 10 years during which he has made numerous evaluations of mineral deposits. Tr. 7. Mr. Owens has inspected the claim at least 4 times. He met with Mr. Brunskill in August of 1975. A year later, he attempted to make a mineral examination of the claim but was refused entrance to do so. In May of 1978, he succeeded in conducting a mineral examination. Tr. 7. Another examination was made on May 30, 1979. Mr. Brunskill was aware of the USFS efforts to make the examinations. Tr. 8.

During his examinations, Mr. Owens found a cabin, mill building, storage shed, outhouse and a power shovel on the claim. Tr. 9. In the course of his 1979 inspection, he found 11 backhoe trenches recently excavated and a rocker box. Tr. 17. He found no recent mining developments during his first inspection. At the most, only exploration trenches were found on the claim. Alluvium and slopewash is observable virtually everywhere on the claim. There is evidence of old workings. Tr. 26, 33.

He selected the largest vertically exposed stream gravel deposit and took samples from that deposit. Tr. 9, Ex. 5. He panned down the samples and sent the concentrates to Metallurgical Laboratories, Inc., in San Francisco for assay. The free gold was amalgamated and a fire assay of the tails was made for gold and silver. Mr. Owens calculated the value of gold at $1.00 per yard, using $275 per ounce for a gold value. Tr. 13. Because of this low result he determined there are insufficient gold values on the claim. At this value, the cost of extracting the gold would

not be recovered. Tr. 14. Consequently, he does not believe a prudent man would be justified in developing the "Gladacres" placer claim. Tr. 15.

Mr. Owens stated that the contestees purchased the claim in 1959 and had mined 12 1/2 oz. of gold since that time. Mr. Brunskill was constructing a three story building, reportedly for use as a mill. At one time Mr. Owens agreed to give Mr. Brunskill a year to make a discovery on the claim. Tr. 18. An attempt to inspect the claim on August 3, 1976 was thwarted when Mr. Brunskill denied USFS personnel permission to go on the claim. Tr. 19.

On cross-examination, Mr. Owens maintained that he looked for mineral deposits on the claim which had been exposed by the claimant in order to determine if there was a discovery of a particular mineral. Tr. 29.

Ernest L. Brunskill testified he had the opportunity to buy the claim in 1959. His only interest in the claim is to develop a mine there. A cabin and tool shed were on the claim when he purchased it. Tr. 42. He added a mill building. He maintains a backhoe, dipper bucket and rocker on the claim. Mr. Brunskill submitted photos of a crane and a D-7 tractor which he had used in leveling some of the land on the claim. Tr. 45. Ex. A and B. He contends that he can process 7 1/2 tons of material per hour through his trommel, and it can be operated by one person. Tr. 49. He believes he can process 300 tons a week and recover $339 for his efforts. Tr. 50. By using another trommel, he could double the expected profits to generate a total of about $1,200 a month. Tr. 51. The cost of hired labor would reduce the recovery to $700 a month. Tr. 52. Another year is needed before the mill building can be completed. After he retires, Mr. Brunskill intends to devote all his time to mining. Tr. 53.

On cross-examination, Mr. Brunskill testified he purchased the claim for $1,800 on the basis of verbal representations concerning the presence of gold. The buildings on the property were worth $2,000. He has spent a total of 5 years time in working time on the claim since 1959. Tr. 61. A total of 8 or 9 ounces of gold has been recovered from the claim in 20 years. Tr. 62. He intends to use the mill building in a concentration process. He did not assign any value to his own labor. Tr. 69. Nor did he calculate the cost of equipment rental since he claims he obtains use of equipment in exchange for his labor. Tr. 70.

Mr. Brunskill had no exposed mineral deposit available for inspection when he refused admittance to USFS mineral examiners in August 1976. Tr. 71. He started digging in the gravels in November of 1978. He concedes he has omitted many expenses that would normally be included in conducting a normal mining operation. Tr. 75. Furthermore, he has not made a deduction based on the fact that the recovery on the Gladacres claim would not be 100% pure gold. Tr. 76.

George Eldon Bedford, the operator of Bedford Aggregates, testified he has a background in geology and the sand and gravel business. Tr. 77. He visited the claims three times and made an estimate of the amount of gravel there. He contended that the best gold values on the claim would be on the upper end near a waterfall close to a dike at the bedrock level. Mr. Bedford would have tested material at this point and periodically down to a lower dike in order to evaluate the claim. Tr. 79. He stated that he would have sampled at a different location than the one selected by Mr. Owens, at a greater depth. Tr. 80. He estimated there is a quantity of 219,000 yards of workable gold-bearing gravel on the claim. It would cost 50 cents a yard "to recover the material" and at least 15 cents a yard to reclaim the land. Tr. 82. He believes an operation processing 200 yards a day would be a practical business. Tr. 83.

Before Mr. Bedford would consider purchasing the claim he would conduct further exploration by sinking holes 20 to 25 feet. Tr. 84. He also would advise Mr. Brunskill to conduct further exploration on the claim. Tr. 87.

Mr. Bedford expressed this view concerning Mr. Brunskill's total efforts to date:

> I think that the effort that he has put in in the last six months, digging these holes, did prove that there is a large enough deposit of gravel to warrant the development of a larger hole to a depth down to bedrock and find out what values are there. Tr. 87.

Mr. Bedford was not asked to evaluate the claim. He did take pan samples which produced some gold colors. Tr. 90.

Summary of Applicable Law

Although the general mining statutes do not expressly define a discovery, it has been held that one exists where:

> "Minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a profitable mine. . . "Castle v. Womble, 19 L.D. 457 (1894).

The above-quoted definition is approved in United States v. Coleman, 390 U.S. 599 (1968), which holds that in determining whether a mineral deposit is valuable, the Secretary of the Interior may require a showing that there is a reasonable expectation based upon the circumstances known at the time that the mineral can be extracted, removed and marketed at a profit. It is stated in Coleman:

> * * * Under the mining laws Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes. The obvious intent was to reward and encourage the discovery of minerals that are valuable in an economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable Thus, profitability is an important consideration in applying the prudent man test. . . .

A finding of mineralization may suggest the possibility of mineral of sufficient value and amount to justify further exploration, but it does not establish a discovery. Chrisman v. Miller, 197 U.S. 313 (1905), Converse v. Udall, 399 F. 2d 616 (9th Cir. 1968), cert. denied 393 U.S. 1025 (1969).

A prima facie case that a discovery of a valuable mineral deposit is lacking is established when a Government mineral examiner gives his expert opinion that he examined a claim and found insufficient values to support a finding of discovery. United States v. Bechthold, 25 IBLA 77 (1976); A Government mineral examiner in evaluating a mining claim is under no duty to undertake discovery work or to explore beyond the current workings of a claim and it is incumbent upon the mining claimant to keep discovery points available for inspection by the mineral examiner. United States v. Larry Joseph Timm, 36 IBLA 316 (1978).

Once the Government has established a prima facie case that a discovery is lacking, the burden of producing preponderating evidence of the existence of a valuable mineral deposit sufficient to support a discovery falls upon the claimant. Foster v. Seaton, 271 F. 2d 836 (D.C. Cir. 1959); United States v. Independent Quick Silver Company, 72 I.D. 367 (1965).

It is not enough that mineral values exposed might justify further prospecting or exploration to determine whether actual mining operations would be warranted. United States v. Terry and Stocker 10 IBLA 158 (1973). Samples and assays without data as to extent in at least two, if not three, dimensions of the ore bodies sampled can mean little or nothing of evidentiary value. United States v. Nor. Pacific Railway Co., 1 Fed. 2d 53, 57. (Mont. 1924). Where a mining claim is worked by the claimant on a "do it yourself" basis, the value of the claimant's labor must be considered in determining whether a profitable venture has been established. United States v. Alexander, 17 IBLA 421, 433 (1974); United States v. Gardener, 18 IBLA 175, 179 (1974).

The prudent man test is an objective not a subjective standard. The test is not whether the particular mining claimant feels justified in the further expenditure of labor and means. Instead, it is whether a person of ordinary prudence would in the circumstances, be justified in undertaking the development of a mine. See U.S. v. E.A. Barrows, et al., 76 I.D. 299 (1969), affirmed 447 F.2d 80 (9th Cir. 1971).

Analysis and Determination

The contestant's mineral examiner collected a sample at the only exposed vertical profile in 1978. At that time there were no recent workings even though Mr. Brunskill had been spending about one-fourth of his time on the claim since 1959. He acknowledged that in 1977 he had no areas open, and that he had started digging in November, 1978. This calls to mind United States v. Zweifel, 502 F.2d 1150, 1156, (10th Cir. 1975), which discusses the decisions of the Department of the Interior, spanning eighty years, which conclude that if a mining claimant has held a claim for several years and has attempted little or no development or operations, a presumption is raised that he has failed to discover valuable mineral deposits or that the market value of existing minerals was not sufficient to justify the costs of extraction.

The testimony of the contestant's expert witness plus the uncontroverted evidence that Mr. Brunskill attempted little or no exploration or development over a very long period of time made a prima facie case sustaining charge 5A of the Complaint (which asserts a lack of discovery of valuable minerals). The contestee asserted that he has spent the equivalent of five years on the claim yet he has recovered a total quantity of gold which amounts to only one-half ounce per year for each of the 20 years he has held the claim.

It is clear that Mr. Brunskill has not taken into consideration the full range of expenses that must be accounted for when a determination is made as to the viability of a mining operation. He proposes to overlook the value of his own labor, the need to amortize the cost of the capital expenditures which have been or will be made, and the reasonable value of equipment rental. He may exchange labor for, or borrow, equipment which can be used on the claim. However, if a drag line is to be used to excavate 300 tons of material each week over an extended period of time, very substantial costs will be incurred for operating equipment of that size. One person who attempts to excavate 60 tons each day, move it to a trommel and process it, will encounter the boulders, slopewash, alluvium, and material which was worked over by miners many years ago. Mr. Brunskill is a telephone company employee, and has furnished no proof that one person can process that quantity of material in one day.

The contestee's witness, Mr. Bedford, testified that further exploratory work is needed on the claim, and described the points at which he would sink holes. On the basis of one shaft sunk some years ago by Mr. Brunskill, which has been cemented in and cannot be checked, Mr. Bedford made an estimate that this claim contains 219,000 cubic yards of workable material -- his assumption is that it is 20 feet to bedrock. It is obvious that work performed on the claim is insufficient to allow a reliable estimate of tonnage or grade of available material to be made. Other holes approximately fourteen feet deep were excavated about six months prior to the hearing, but there is no information concerning those holes.

The contestee did not overcome the prima facie case established by the contestant that a discovery of valuable minerals has not been made on the GLADACRES placer mining claim. There appears to be no need to reach conclusions relating to the other two charges in the Complaint.

The GLADACRES placer mining claim, the subject of the Complaint and Answer in this proceeding, is hereby declared null and void.

Dean F. Ratzman
Administrative Law Judge

Appeal Information

An appeal from this decision may be taken to the Board of Land Appeals, Office of the Secretary, in accordance with the regulations in 43 CFR Part 4 (revised as of October, 1978). Special rules applicable to public land hearings and appeals are contained in Subpart E. If an appeal is taken, the notice of appeal must be filed in this office (not with the Board) in order to facilitate transmittal of the case file to the Board. If the procedures set forth in the regulations are not followed, an appeal is subject to dismissal. The adverse party to be served with a copy of the notice of appeal and other documents is the attorney for the United States Department of Agriculture whose name and address appear below.

Enclosure: Additional information concerning appeals.